In the District Court of the United States for the Northern District of Illinois, Eastern Division

CIVIL ACTION No. 46 C 1604

CORN PRODUCTS REFINING COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered December 5, 1946, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiff-appellant's

[1] The District Court also made Findings of Fact and Conclusions of Law, though writing no opinion. Upon motion by plaintiff-appellant for a new trial and to set aside the Court's Decree, Findings of Fact, and Conclusions of Law, the District Court entered a written opinion on February 6, 1947, denying said motion.

complaint to set aside an order of the Interstate Commerce Commission dated July 1, 1946. Appeal was allowed on April 3, 1947. Copies of the appeal papers were served on April 4, 1947.

The Commission's order assailed on this appeal concerns plant switching services by rail carriers, and the issues are the same as have been presented in several of the so-called terminal service cases in which the Commission's orders have been uniformly sustained by this Court.[2]

All of these cases, and many others including the case now on appeal, grew out of an extensive general investigation instituted by the Commission on its own motion in 1931, entitled *Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services.* The investigation related to the payment of allowances by carriers to industries for the performance of terminal switching services or the performance of such services by carriers for industries free of charge. On May 14, 1935, the Commission rendered its main report, 209 I. C. C. 11, in which it reached the general conclusion that when a carrier is prevented at its ordinary operating convenience from reaching points of load-

[2] *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402 (1937); *Goodman Lumber Co.* v. *United States*, 301 U. S. 669 (1937); *A. O. Smith Corp.* v. *United States*, 301 U. S. 669 (1937); *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156 (1938); *United States* v. *Wabash R. Co.* (the *Staley* case), 321 U. S. 403 (1944); *Hanna Furnace Corp.* v. *United States*, 323 U. S. 667 (1944).

ing or unloading within a given plant, due to interruption or interference by the desires of an industry or the disabilities of its plant, the service beyond such point of interruption or interference is in excess of that performed in simple switching or team-track delivery.[3] The Commission further concluded that services beyond that point were in excess of the carriers' transportation obligation under their line haul rates, and that the performance of such services by the carriers under such rates, or the payment by them of allowances to shippers for the performance of such services by the shippers, was an unlawful rebate in violation of Section 6 (7) of Part I of the Interstate Commerce Act (49 U. S. C. 6 (7)).

The foregoing findings among others contained in the Commission's basic report were sustained by this Court in the *Tin Plate* case, *supra*, and the standards and general principles therein established have been followed and applied by the Commission ever since in supplemental proceedings with respect to particular industrial plants. The Commission's orders in these supplemental proceedings have been uniformly sustained. The

[3] "Simple switching delivery" and "team-truck delivery" are well understood terms in the lexicon of commerce law. The former means placing a car on a siding leading to a plant. The latter means putting cars on a spur belonging to a railroad to which there is access by wagons or other conveyances, and in this type of switching the unloading must be made at the convenience of the railroad.

few cases in which Commission orders were set aside by lower courts have all been reversed by this Court. The applicable standards and legal principles are thus well settled and now unassailable.

This case is merely another of these supplemental proceedings in *Ex Parte 104* (the 74th). The Commission's order and report here under review, 266 I. C. C. 181, require the carriers named in said order to cease the performance of certain spotting services within appellant's plant at Argo, Illinois, as a part of their line-haul transportation obligation. The order directs that these plant services either be discontinued or be subject to charge.

The contentions urged by appellant in this case are identical with contentions advanced in the other terminal service cases which have been passed upon by this Court. The Government submits that a comparison of appellant's assignment of errors with those urged in previous cases reviewed by this Court convincingly demonstrates that no substantial question is presented by this appeal.

Although appellant raises each and every issue upon which it relied in the court below, it is apparent from a reading of appellant's Jurisdictional Statement that the contention upon which it chiefly relies is the claim that it was denied a full and fair hearing because the Commission excluded as irrelevant certain evidence proffered

by appellant to show "customary practices of carriers in making delivery of cars to industrial plants." As explained by the court below in its opinion of February 6, 1947 (Appendix A-2 of Appellant's Jurisdictional Statement), this evidence was properly excluded by the Commission as irrelevant by virtue of decisions by this Court, and its asserted relevance rested upon a "misconception" by "plaintiff's counsel" which is apparent from "a review of the authorities."

Appellant repeatedly argued that it is the usual and customary practice everywhere in the United States (with the exception of the Staley plant at Decatur, Illinois) for the railroads to perform switching of cars within an industry's plant at the line-haul rates which are treated as full compensation. When confronted with this Court's decision in the *Tin Plate* case where the Court held that "There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service" (301 U. S. 402, 410), appellant asserted:

> Now it does not appear in the *Tin Plate* case that either the railroad or the industry offered proof of the custom, and the Supreme Court, therefore, proceeded to its conclusion and assumption that it was not the custom that the line-haul rates covered the spotting service.
>
> Now, *that was an incorrect assumption. The Court, of course, is excused because there was no evidence to the contrary,* but

> we, however, offered evidence here to prove that the assumption was incorrect and that the custom did exist, *exist universally throughout the United States;* that the line-haul rates include compensation for switching cars to and from points of loading and unloading *at every industry except Staley,* where the railroads do the work. [Italics supplied.] [4]

To the contrary, this Court stated in the *Tin Plate* case (301 U. S. 402, 409–410):

> It is asserted by the appellees that it has been customary to do this spotting on plant tracks as part of the delivery service which the carrier holds itself out as agreeing to perform without charge additional to the line-haul rates. *The record fails to establish any such custom.* * * * *It appears from the record* that the making of allowances has not been governed by any principle and the cases fall into three general classes: (1) where the plant does its own spotting and receives an allowance; (2) *where the railroad does plant spotting;* (3) where the industry does its own spotting and receives no allowance. [Italics supplied.]

Accordingly, as the lower court properly held in its Conclusions of Law, and reaffirmed in its opinion of February 6, 1947, the Commission was not required to receive evidence for the purpose

[4] Transcript of oral argument before the District Court on November 5, 1946, at pages 82–83.

of showing practice and custom because the Supreme Court had settled that question on its review of the Commission's basic record in the *Tin Plate* case. It is not without significance that of the six cases consolidated on appeal in the *Tin Plate* case, one (the *Weirton Steel* case) involved the *rendition of spotting services by the carriers* without charge in addition to the line-haul rates. The Commission's report and order sustained there are thus identical with the situation here.[5]

Moreover, on appeal of the *Staley* case (*United States* v. *Wabash R. Co.*, 321 U. S. 383) in 1944, this Court reaffirmed its holding in the *Tin Plate* case and sustained the Commission's order forbidding carriers to perform spotting services at the Staley plant without charge in addition to their line-haul rates.

The identical contention urged by appellant with respect to receipt of evidence was rejected by this Court in 1944 in *Hanna Furnace Corp.* v.

[5] Further refutation of appellant's contention that the custom existed universally throughout the United States with the exception of the Staley plant at Decatur, Illinois, is contained in the District Court's opinion in *Inland Steel Company, et al.* v. *United States*, 23 F. Supp. 291 (N. D., Ill., 1938). Six terminal service cases were there consolidated and decided in one opinion. One of these cases involved the Crane Company of Chicago, and the Commission's order, consistent with its orders in connection with the Weirton Steel plant and the Corn Products plant, directed the *carriers* to cease performing spotting services free of charge. Moreover, the Crane Company plant, like the Corn Products plant lies within the so-called Chicago switching district.

United States, 323 U. S. 667. The appellant in that case stated the point as follows:

> The appellant contends that a finding by the Commission that the spotting in its plant exceeds the service rendered by the railroads in spotting cars on team-tracks and industrial spur tracks, *without receiving evidence* and determining the extent and relative cost of spotting service on team-tracks, especially in the Buffalo switching district, is wholly arbitrary and without legal basis. [Italics supplied.] [6]

Rejecting this contention as unsound and unworthy of further consideration, this Court sustained the Government's Motion to Affirm.

Equally without merit is appellant's assignment of error with respect to the lower court's conclusion of law that the so-called "Baasch-Jones" tariffs, were inapplicable to the issues under consideration in this proceeding and did not and could not supplant or supersede ***Ex Parte 104*** proceedings. In the first place, the tariff on its face does not purport to apply to switching services which the Commission finds to be plant services not lawfully within the carrier's line haul obligation. Moreover, assuming *arguendo* that the purpose of filing the tariffs was, as contended by appellant, to supersede and supplant ***Ex Parte 104*** proceedings, it could not have much effect as

[6] Appellant's Brief Opposing the Government's Motion to Affirm, Vol. 83, U. S. Sup. Ct. Records & Briefs, No. 132, Oct. Term, 1944, p. 20.

a matter of law. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511.

Appellant's remaining assignments of error relate to the sufficiency of evidence to support the Commission's findings in its report and order. The lower court after benefit of a painstaking review of the evidence of record found that the Commission's report and order were supported by substantial evidence. Appellant's contention here that they were not deserves little consideration.

Appellant's bill of complaint before the court below as well as its discussion of errors assigned here convincingly demonstrate that its real contention with respect to the sufficiency of the evidence is that the Commission should have accepted the evidence which it proffered as to what was the usual and customary service contemplated by and rendered under line-haul rates, and should not have drawn its own conclusions from the undisputed facts showing the actual physical conditions of operations prevailing at appellant's plant.

The contention thus resolves itself into a quarrel with the Commission concerning not the lack of facts or the absence of substantial evidence, but the weight to be given and conclusions to be drawn from abundant and undisputed evidence which the record does contain. This familiar type of attack upon the sufficiency of evidence cannot prevail. *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 99–100; *Assigned*

Car Cases, 274 U. S. 564, 580–581, 583. As this Court emphasized in *United States* v. *Wabash R. Co.*, 321 U. S. 403, 409: "The controlling question in this type of litigation is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding."

In deciding the scope of the carrier's transportation obligation in this supplemental proceeding, the Commission applied to the situation existing at appellant's plant the standards which had been enunciated in its basic report of May 14, 1935 (209 I. C. C. 11) and approved by this Court in the *Tin Plate* case.[7]

In accordance with these established criteria for determining where the carriers' transportation obligation begins and ends with respect to appellant's plant, the Commission received evidence and based its findings upon facts relating to the plant tracks, the plant buildings and facilities served, the interchange tracks of the carriers, and the actual conditions and circumstances of the physical movement of the cars, including the vital fact as to whether the physical movement occurs at the discretion and convenience of the

[7] In *United States* v. *Wabash R. Co.*, 321 U. S. 403, 412, this Court expressly approved the application of the standards established in the Commission's *Ex Parte 104* basic report to the conditions at the *Staley* plant.

carriers or at the convenience and under the direction and supervision of the industry. The evidence in this case was overwhelming that the switching and movement of cars was at the convenience and under the direction and supervision of appellant.

Both the Commission and later the District Court had before them a large blueprint showing in detail appellant's plant buildings, facilities, and its extensive system of interlacing tracks connecting with the rail facilities of the Chicago Belt, the Indiana Harbor Belt, the Alton, and the B. & O. Chicago Terminal railroads. The plant lay-out extended over an area of approximately 200 acres and included 23½ miles of trackage. In and of itself, the complicated design of the plant prevents the servicing carriers individually or collectively from removing and delivering cars at the loading and unloading points in a continuous movement without interruptions and interferences. This includes the fact—which the record shows appellant did not attempt to deny or refute—that all cars moving in or out of the plant are first moved to and come to rest upon a series of thirteen plant tracks, customarily and regularly used as interchange tracks in switching the plant.

The Commission's reports under attack in this case describe all the foregoing in detail. On the basis of a voluminous record of physical data and pattern of operations which had been accepted

by this Court as controlling in all previous terminal switching cases, it is difficult to perceive how the Commission or the District Court could have reached conclusions other than they did. Appellant's contentions to the contrary are merely a familiar example of efforts to have this Court substitute appellant's judgment for that of the Commission in determining the value and weight to be attributed to evidence. This the District Court properly refused to do.

For the foregoing reasons, it is respectfully submitted that no substantial question is presented by this appeal, and that the judgment of the District Court should be affirmed.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

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